APPENDIX "A"

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act	Compensation Order Rejection of Claim
JOHN HOUSER, *Claimant*,	
v.	Case No. 991-2170
AMERICAN MAIL LINE, *Employer*,	
FIREMAN'S FUND INSURANCE COMPANY, *Insurance Carrier.*	

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the first day of May, 1965, the claimant above named was in the employ of the employer above named at Portland, Oregon, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for the payment of compensation under said Act was insured by Fireman's Fund Insurance Company; that on said date the claimant was performing service as

a slingman for the employer and engaged in unloading creosoted piling from a railroad car onto the deck of the vessel, GUAM BEAR, which was afloat in the Willamette River and tied up at the water side of Terminal No. 1, Berth 7; that his duties consisted of hooking a sling onto a load of piling which was then unloaded from the railroad car by means of the vessel's gear; that the claimant had stepped from a pile of pallet boards stacked on the dock to the railroad car and picked up a sling preparatory to hooking onto a load of piling when he fell over backwards from the railroad car to the dock, a distance of approximately 18 feet, in consequence of which he suffered injuries to his head, right shoulder and ribs; that Terminal No. 1, which is a dock approximately 1100 feet in length, is attached to the land at one end and juts outward to, and over the waters of the Willamette River for a distance of approximately 34 feet; that there are two sets of railroad tracks running alongside the dock and across the water side; that the gondola-type railroad car from which the piling was being unloaded was on the outside track approximately 8 feet 6 inches from the water side of the dock; that the injury sustained by the claimant had its inception on the railroad car and culminated on the dock; that the dock, due to its connection to the land, is an extension of the land; that the injury sustained by the claimant on May 1, 1965 did not occur upon the navigable waters of the United States (including any dry dock) and said injury is excluded under the provisions of Section 3(a) of the Act.

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim be, and it is hereby REJECTED for the reason that the injury

sustained by the claimant on May 1, 1965 did not occur upon the navigable waters of the United States (including any dry dock) within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Seattle, Washington, this 15th day of July, 1965.

J. J. O'LEARY
Deputy Commissioner
Fourteenth Compensation District

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN HOUSER, *Libelant,* vs. J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, *Respondent,*	Civil No. 65-375 OPINION
AMERICAN MAIL LINE, LTD., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Intervenors.*	March 19, 1966

SOLOMON, Chief Judge:

Libelant, John Houser, appeals from a decision of the Deputy Commissioner denying him compensation benefits under the Longshoreman's and Harbor Worker's Compensation Act. 33 U.S.C. §§901-950. This case is now before the Court on motions for summary judgment filed by all of the parties.

The facts are not in dispute. Houser was injured on May 1, 1965, while employed as a longshoreman by W. J. Jones, Inc., stevedores. He was working as a slingman on a pier adjacent to the vessel GUAM BEAR, which was afloat in navigable waters. Houser's job was to stand aboard a railroad car and hook a sling onto a load of creosoted piling which was then lifted from the railroad car to the deck of the vessel by the vessel's gear. As Houser stepped aboard the railroad car and prepared to hook a sling onto a

load of piling he fell over backwards from the car to the pier, a distance of approximately 18 feet. He suffered injuries to his head, right shoulder, and ribs.

The pier, Terminal No. 1 of the Portland Public Docks, runs approximately 1,100 feet alongside the Willamette River. It extends on pilings 34 feet over the water. Two railroad tracks run along the pier; the one on which Houser was injured was within ten feet of the water side of the pier.

Compensation under the Longshoreman's and Harbor Worker's Act is available only when the injury is suffered "upon the navigable waters of the United States (including any drydock)". 33 U.S.C. § 903(a). The Deputy Commissioner followed a long line of cases holding that a pier is an extension of the land and held that Houser's injury was not compensable under the Act because it did not occur upon the navigable waters of the United States. See, e.g., *Swanson* v. *Marra Bros. Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946); *Johnston* v. *Marshall*, 128 F.2d 13 (9 Cir. 1942); *American Export Lines, Inc.* v. *Revel*, 266 F.2d 82 (4 Cir. 1959).

Houser argues that the "navigable water" concept should be expanded to make coverage under the Act co-extensive with the limits of admiralty jurisdiction. The Admiralty Extension Act of 1948 extended maritime jurisdiction to injuries occurring on land but caused by a vessel on navigable water. 46 U.S.C. § 740. It thus made admiralty remedies available for at least some injuries suffered upon a pier. Houser then argues that State compensation plans cannot apply to injuries suffered within the admiralty jurisdiction [see *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917)] and

that the Longshoreman's Act must be interpreted to fill the void.

Houser's argument has been uniformly rejected, most recently in an opinion by Walter E. Hoffman, an able and distinguished trial judge from the Eastern District of Virginia, Norfolk Division. *East* v. *Oosting*, 245 F. Supp. 51 (E. D. Va. 1965). See also *Johnson* v. *Traynor*, 243 F. Supp. 184 (D. Md. 1965). *Cf. Michigan Mutual Liability Co.* v. *Arrien*, 344 F.2d 640 (2 Cir. 1965). These cases also reject the contention that the water under a pier is navigable within the meaning of the Act.

I am convinced that the interpretation given to the Act by these cases is correct. The libelant's motion for summary judgment is denied. The motion for summary judgment of the respondent and intervenors is granted.

APPENDIX "C"

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN HOUSER,
Appellant,

vs.

J. J. O'LEARY, Deputy Commissioner Fourteenth Compensation District, AMERICAN MAIL LINE, LTD., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation,
Appellees.

No. 21,289

[September 27, 1967]

On Appeal from the United States District Court for the District of Oregon

Before: POPE, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge:

The question presented by this appeal is whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, covers injuries occurring on wharves.

Appellant is a longshoreman who, on May 1, 1965, was engaged in loading the vessel Guam Bear at Portland. He was working as a slingman on a pier adjacent to the ship, which was afloat on navigable waters. His job was to stand on top of a railroad gondola car and hook a sling onto a load of cargo, which would then be lifted from the gondola to the deck of

the ship by the ship's gear. As Houser stepped aboard the gondola, he fell over backward from the car onto the pier, a distance of about 18 feet, and suffered severe injuries. The ship's gear played no part in the accident.

Section 903(a) provides:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable water of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *"

Appellee Deputy Commissioner rejected appellant's claim for compensation upon the ground that the wharf where the injury occurred was, under a settled line of precedent, an extension of the land to which it was attached, and thus that the injury had not occurred on navigable waters. The District Court affirmed on the same ground. 253 F.Supp 417 (D. Ore. 1966). We agree.

This court has, in the past, rejected coverage by the Act of injuries so located. *Johnston* v. *Marshall*, 128 F.2d 13 (9th Cir.) *cert. denied*, 317 U.S. 649 (1942).[1] Appellant contends, however, that the "nav-

[1] Even prior to the enactment of the Longshoremen's Act in 1927 injuries occurring on wharves were held to be land injuries and thus not on the "navigable waters" which then constituted all that was within the scope of general maritime law. *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). Decisions since the Act have assumed that by its terms it excludes injuries suffered on piers, wharves and similar structures. *E.g., Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946); *O'Keefe* v. *Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir. 1965); *American Export Lines* v. *Revel*, 266 F.2d 82 (4th Cir. 1959).

igable waters" concept should be expanded to make coverage under the Act coextensive with the limits of Admiralty jurisdiction. He points out that his employment under a maritime contract is within traditional Admiralty contract jurisdiction and that some wharf locus torts are covered by the current view of Admiralty tort jurisdiction. As support for his contention he relies on language in *Calbeck* v. *Travelers Insurance Company*, 370 U.S. 114, 130 (1962). There the Court, quoting Judge Hutcheson in *DeBardeleben Coal Corporation* v. *Henderson*, 142 F.2d 481, 483-84 (5th Cir. 1944), stated:

> "It is sufficient to say that Congress intended the Compensation Act to have a coverage coextensive with the limits of its authority * * *. In the application of the Act, therefore, the broadest ground it permits of should be taken."

To read this language as applying to the problem before us is to read it out of context. Neither *Calbeck* nor *DeBardeleben* was concerned with the meaning of the "navigable waters" requirement of § 903(a). The problem in those cases was how to construe the *second* requirement of § 903(a): whether the Act provided compensation for injuries sustained by employees on navigable waters "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." 370 U.S. at 117.

It may well be true that when it was judicially established that wharves were extensions of land the state of the law then excluded injuries occurring on land from Admiralty tort jurisdiction, and that the law has since changed and is still undergoing change in this respect. The fact is, however, that Congress

did not choose to make the coverage of the Act co-extensive with Admiralty jurisdiction in respect to locus of injury. Legislative history referred to in *Calbeck, supra*, at 122, shows that an earlier version of the Act provided:

> "This Act shall apply to any employment performed on a place within the Admiralty jurisdiction of the United States * * *."

This language was rejected in favor of "upon the navigable waters of the United States." As stated by Judge Hays, dissenting in *Michigan Mutual Liability Company* v. *Arrien*, 344 F.2d 640, 649 (2d Cir.), *cert. denied* 382 U.S. 835 (1965),[2] this "was a conscious choice of adopting known distinctions based on pre-existing Admiralty decisions, rather than tying the scope of the Act to changing concepts of maritime jurisdiction."[3]

That this is a choice the courts should not upset is strongly suggested by *Calbeck* where, in reference to

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[2] In this case the court held for coverage by the Longshoremen's Act of an injury occurring on a "skid," a portable extension of a wharf. It recognized, however, that "injuries on wharves or other extensions of land permanently covering navigable waters were not to be covered." 344 F.2d at 644.

[3] Appellant relies on the Admiralty Extension Act of 1948, which extended maritime tort jurisdiction to injuries occurring on land but caused by a vessel on navigable waters. 46 U.S.C. § 740. That this statute did not by implication extend the coverage of the Longshoremen's Act is clear for the reasons given in *Johnson* v. *Traynor*, 243 F. Supp. 184, 190-94 (D.Md. 1965). The shoreward movement of the doctrine of unseaworthiness, noted in *Gutierrez* v. *Waterman S. S. Corp.*, 373 U.S. 206, 214-15 (1963), is similarly inapplicable to appellant's claim. Although Houser, since he was engaged in unloading cargo, may well have come within the Admiralty jurisdiction for the purpose of recovery under the unseaworthiness doctrine had ship's gear been involved, he cannot claim that this status allows him to claim compensation under the Longshoremen's Act

the problem with which it was dealing, the Court stated:

> "Such a purpose would require, rather, that federal coverage expand and recede in harness with developments in constitutional interpretation as to the scope of state power to compensate injuries on navigable waters. But that would mean that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that that implies; and that each and every award of federal compensation would equally be a constitutionally premised denial of state competence in a like situation. We cannot conclude that Congress imposed such a burden on the administration of compensation by thus perpetuating the confusion generated by *Jensen*. To dispel that confusion was one of the chief purposes of the Longshoremen's Act." 370 U.S. at 126.

If we adopted appellant's view that the Act's coverage flows and ebbs with the scope of Admiralty tort jurisdiction, every case in this area would require a decision of constitutional dimension as to the reach of Admiralty and we would be importing into the Act the very evil the Court sought to prevent in *Calbeck*.

Judgment affirmed.

BRIEF IN OPPOSI - TION TO PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court

of the United States

OCTOBER TERM, 1967

No. 1017

JOHN HOUSER,

Petitioner,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District,

and

AMERICAN MAIL LINE, LTD., a corporation,

and

FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENTS AMERICAN MAIL LINE, LTD., and FIREMAN'S FUND INSURANCE COMPANY

In Opposition to Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

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In the Supreme Court
of the United States
OCTOBER TERM, 1967

No. 1017

JOHN HOUSER,

Petitioner,

v.

J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District,

and

AMERICAN MAIL LINE, LTD., a corporation,

and

FIREMAN'S FUND INSURANCE COMPANY, a corporation,

Respondents.

BRIEF OF RESPONDENTS AMERICAN MAIL LINE, LTD., and FIREMAN'S FUND INSURANCE COMPANY

In Opposition to Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

Respondents American Mail Line, Ltd. and Fireman's Fund Insurance Company pray that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The order of the respondent deputy commissioner (Appendix A herein) dated July 15, 1965, holding that petitioner was not entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq. is not reported.

The opinion of the District Court (Appendix B herein) dated March 19, 1966, affirming the respondent deputy commissioner is reported at 253 F. Supp 417.

The opinion of the Court of Appeals for the Ninth Circuit affirming the District Court (Appendix C herein) filed September 27, 1967, is reported at 383 F.2d 730.

JURISDICTION

The decision of the Court of Appeals was made on September 27, 1967. The petitioner applied for an extension of time within which to file a petition for a writ of certiorari and was granted until January 15, 1968. The petition was docketed on January 13, 1968.

QUESTION PRESENTED

The single question presented is whether benefits provided by the Longshoremen's and Harbor Workers' Compensation Act will be extended to a longshoreman injured on a wharf while assisting in the loading of a vessel afloat in navigable waters of the United States.

STATUTES INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 903(a)) provides:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law . . ." March 4, 1927, c. 509, § 3, 44 Stat. 1426.

STATEMENT OF THE CASE

The respondent deputy commissioner found the facts to be as follows (paraphrasing):

On May 1, 1965, petitioner, John Houser, was employed by respondent[1] American Mail Line as a slingman. Respondent American Mail Line was loading piling aboard the SS GUAM BEAR. The vessel was moored alongside Berth No. 7 at Terminal No. 1 on the Willamette River in Portland, Oregon. Petitioner's work at the time of his injury was to hook the slings to creosoted piling on gondola cars so that the vessel's gear could lift the piling from the gondola car to the deck of the vessel. While petitioner was engaged in hooking up the sling, he fell from the gondola car to the dock.

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[1] The District Court opinion says that petitioner was employed by W. J. Jones, Inc. This is incorrect. Petitioner was employed by respondent American Mail Line, Ltd.

The gondola car was located on railroad tracks running parallel to the face of the dock. The tracks were eight feet six inches from the waterside of the dock. The dock extends out over the Willamette River a distance of approximately 34 feet (at zero datum, R. 35).

The deputy commissioner found that the dock was an extension of land and that the injury did not occur upon navigable waters of the United States, and accordingly denied compensation.

REASONS FOR REFUSING THE WRIT

(One) The courts, including this Court, have uniformly held that injuries on the wharf are non-maritime.

(Two) There is no conflict between the decision of the Court of Appeals herein and another Court of Appeals decision.

(Three) The decision of the Court of Appeals is not in conflict with any decision of this Court and specifically is not in conflict with *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 82 S. Ct. 1196, 8 L. Ed. 2d 368 (1962).

(Four) The Court of Appeals decision does not unfavorably affect the administration of the Longshoremen's and Harbor Workers' Compensation Act in such a way as to require an authoritative decision from this Court.

DECISIONS BY COURTS OF APPEALS

The petitioner reports (Pet. Br. 7) that two other cases raising the same issues are presently before this Court. The petitions for writ of certiorari were denied on January 15, 1968, in both cases. *Andrew Nicholson* v. *Calbeck*, No. 877, October Term, 1967; *James D. McCollough* v. *The Traveler's Insurance Co., et al*, No. 788, October Term, 1967.

In both *Nicholson* and *McCollough*, the Court of Appeals for the Fifth Circuit held that injuries on the dock are not within the ambit of the Longshoremen's and Harbor Workers' Compensation Act.

Certainly, this case presents no more meritorious basis for granting the petition than the Fifth Circuit cases.

In *Johnston* v. *Marshall*, 128 F.2d 13 (C.A. 9, 1942) cert. den. 317 U.S. 629, reh. den. 318 U.S. 799, the Court of Appeals held that an injury on the dock was not within the scope of the Act and having been settled precedent for 25 years the holding should stand. The petitioner admits (Pet. Br. 19, 20) that there is no conflict among the courts.

What the courts have been saying all these years is that a wharf is a part of the land and not within maritime jurisdiction or on navigable waters. See, e.g., *State Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933, 25 A.L.R. 1013 (1922).

The maritime jurisdiction of the Federal government is clearly limited by constitutional grant; the problem lies in determining the boundary. *U. S.* v. *Matson Navigation Co.*, 201 F.2d 610 (C.A. 9, 1953). Congress cannot by legislation expand the boundary. The ST. LAWRENCE, 66 U.S. (1 Black) 522, 17 L. Ed. 180 (1861). Chief Justice Hughes has told us:

> "The framers of the Constitution did not contemplate that the maritime law should remain unalterable. . . . But in amending and revising the maritime law, the Congress necessarily acts within a sphere restricted by the concept of the admiralty and maritime jurisdiction." *Detroit Trust Co.* v. *The THOMAS BARLUM*, 293 U.S. 21, 43, 44, 55 S. Ct. 31, 79 L. Ed. 176 (1934).

The reason that a wharf has never been held to be within the maritime jurisdiction is:

> ". . . the bridges, shore docks, protection piling, piers, etc., pertained to the land. They were structures connected with the shore and immediately concerned with commerce on land. None of these structures were aids to navigation within the maritime sense, but extensions of the shore and aids to commerce on land as such." *Cleveland Terminal R. R.* v. *Cleveland Steamship Co.*, 208 U.S. 316, 321, 28 S. Ct. 414, 52 L. Ed. 508 (1908).

THE CALBECK DECISION

A careful reading of *Calbeck* v. *Traveler's Insurance Co., supra,* convinces one that this Court very carefully excised an error which had crept into the proper interpretation of the Longshoremen's and

Harbor Workers' Compensation Act. This Court made it clear that what it was doing was removing a court-made exception to coverage under the Act; the Court was not broadening coverage beyond what was intended by Congress. The Court simply held that "on navigable waters" meant what it said and the court-engrafted exception "except in the case of new construction" was to be stricken.

In the *Calbeck opinion* (370 U.S. 114 at 129) this Court was of the view that Judge Hutcheson was correct in *Debardelben Coal Corp.* v. *Henderson*, 142 F.2d 481, 483, 484 (C.A. 5, 1944) when he said that the "local concern" doctrine was a pre-Act device to afford state coverage to on the water injuries. The 1927 federal act eliminated the need for the doctrine and the "local concern" doctrine certainly was not to be termed the exclusive remedy in any event. Judge Hutcheson relied on an earlier Fifth Circuit decision, *Continental Casualty Co.* v. *Lawson*, 64 F.2d 802 (C.A. 5, 1933) in which the court had held injuries on a marine railway within the Act. The court stated, *inter alia*,:

> "The Act does not undertake to provide compensation for injuries occurring on the ordinary dock or wharf used in loading and unloading cargo, doubtless because in the opinion of Congress, either this kind of dock, being an extension of the land, was exclusively within the jurisdiction of the States [citing cases]; or because the Act would not apply to most cases of injury to longshoremen who usually are employed to work on the dock or wharf not by the shipown-

> ers but by independent contracting stevedores. The use of the phrase 'including any drydock' in No. 3 [33 U.S.C.A. Sec. 903(a)] discloses also an intention to exclude the ordinary cargo dock or wharf; to distinguish between the making of repairs to ships and the handling of cargo on shore; to assume jurisdiction over the former but over the latter class of work." 64 F.2d 802 at 805.

In *Calbeck* this Court noted that Congress did not intend to cover injuries on the wharf. The Court quoted the Senate report as follows:

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States." Senate Report No. 973, 69th Congress, First Session, at 16, quoted in *Calbeck* v. *Traveler's Insurance Co.*, 370 U.S. 114, 121, footnote 10.

Calbeck, searching for Congressional intent, eliminated one unnecessary judicial distinction, there is no need now to consider engrafting another judicial distinction onto the Act.

Petitioner's whole case rests on the proposition that:

> ". . . as used in 33 U.S.C.A. § 903(a), the words 'navigable waters of the United States' refer to jurisdiction, not to a geographical line.

> "We believe that this is the meaning of *Calbeck*, and if that is true, it is clear the dockside injuries to longshoremen employed in loading or unloading the ship are within the terms of the [Act]." (Pet. Br. 17).

The fallacy in petitioner's reasoning is that once again coverage is sought to be based on the type of work being performed, i.e., loading or unloading the ship. Such amorphous distinctions were expressly condemned in *Calbeck* and earlier in *Pennsylvania R. R.* v. *O'Rourke*, 344 U.S. 334, 73 S. Ct. 302, 97 L. Ed. 367 (1953).

Furthermore, in *Calbeck*, this Court expressed its disapproval of a federal-state coverage rule which depended on the ebb and flow of the court-defined limits of federal maritime jurisdiction. The Court said:

> "But that would mean that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that implies; . . . . To dispel that confusion was one of the chief purposes of the Longshoremen's Act." *Calbeck* v. *Traveler's Ins. Co.*, *supra* at 126.

Petitioner suggests (Pet. Br. 18) an alternative basis for awarding him federal benefits. He suggests that because the wharf on which he was working extended out over the river water, he was working "on navigable waters." This claim, petitioner admits, creates opportunities for

> ". . . anomalies and excrescences of interpre-

tation more extreme than those plaguing the administration of the Act at present." (Pet. Br. 19).[2]

ADMINISTRATION OF THE ACT

Petitioner (Br. 19-22) seeks to make out a need for a consideration of this case as a basis for an authoritative decision in a problem area citing several cases. The fallacy in petitioner's plea is that this case is not the problem case he would make it. The problem cases are boundary line cases. He did not fall across the boundary between state and federal coverage. He was not thrown or catapulted across the line. He was not on one side and injured by equipment or cargo moving from the other side. The petitioner fell from a gondola car at rest on the dock to the same dock. As the Court of Appeals so aptly noted in its opinion, (Appendix C, p. 20) ship's gear was not involved and petitioner could not rely on tort jurisdiction under the doctrine of unseaworthiness or the Admiralty Extension Act of 1948 (Appendix C, p. 22, footnote 3).

There is nothing in the record here which would indicate that administration of the Act would be aid-

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[2] The record is not at all clear that petitioner was actually over the water. Petitioner's witness Gregor testified only that at "zero datum" the water extended under the dock about 34 feet (R. 35). The Court of Appeals for the Fifth Circuit rejected the contention that waters under a pier are navigable.

> "The limited navigability of the water under the pier is characteristic of piers generally and as a matter of law is not navigability within the meaning of the term 'navigable waters.'" *Nicholson* v. *Calbeck*, 385 F.2d 221, 222 (C.A. 5, 1957).

ed by moving coverage shoreward. The problems attendant upon determining status[3] or situs would exist no matter where the line were drawn.

The edge of the wharf next to the ship is a definite and clearly defined and the most easily understood and easily administered line. Efforts to move it should be resisted.[4]

The able district judge who wrote the opinion below in this case relied heavily on the exhaustive opinion of District Judge R. Dorsey Watkins in the cases of *Johnson & Klosek* v. *Traynor*, 243 F. Supp. 184 (D. Md., 1965). Respondents find the opinion of Judge Watkins scholarly and also persuasive from a common sense standpoint. Judge Watkins concluded:

> "The line had to be, and has to be, drawn somewhere. Congress drew it between the land and the navigable waters of the United States." 243 F. Supp 184 at 189.

The argument (Pet. Br. 18) that all harborworkers ought to have the same benefits fails to solve the problem; a line has to be drawn somewhere and when it is, men are going to be falling across it physically if the line is geographical, or working on both sides of it if it is defined in terms of duties.

Petitioner suggests no guide which would help

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[3] Petitioner points up his maritime status as a slingman (Pet. Br. 5). Status as a test of coverage has been rejected by this Court. *Pennsylvania R. R. Co.* v. *O'Rourke*, supra.

[4] It should be noted that current proposals in Congress to amend the Act do not contain any provisions to move the boundary shoreward and thus correct the "violence" and "demoralizing" petitioner purports to see. (See S.B. 2485.)

deputy commissioners decide on a day to day basis whether a particular shoreside injury was suffered, according to petitioner's test, by a ". . . harborworker . . . within the tort or contract admiralty jurisdiction of the United States." (Pet. Br. 19).

CONCLUSION

The face of the wharf is the logical boundary between the Longshoremen's and Harbor Workers' Compensation Act and state compensation acts. In this case, and in the vast majority of cases, such a boundary facilitates administration of compensation claims, thereby insuring injured workmen early and certain benefits. The petition should be denied.

Respectfully submitted,

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APPENDIX "A"

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES' COMPENSATION
FOURTEENTH COMPENSATION DISTRICT

In the matter of the claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act	Compensation Order Rejection of Claim
JOHN HOUSER, *Claimant,*	
v.	Case No. 991-2170
AMERICAN MAIL LINE, *Employer,*	
FIREMAN'S FUND INSURANCE COMPANY, *Insurance Carrier.*	

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT

That on the first day of May, 1965, the claimant above named was in the employ of the employer above named at Portland, Oregon, in the Fourteenth Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for the payment of compensation under said Act was insured by Fireman's Fund Insurance Company; that on said date the claimant was performing service as a slingman for the employer and engaged in unload-

ing creosoted piling from a railroad car onto the deck of the vessel, GUAM BEAR, which was afloat in the Willamette River and tied up at the water side of Terminal No. 1, Berth 7; that his duties consisted of hooking a sling onto a load of piling which was then unloaded from the railroad car by means of the vessel's gear; that the claimant had stepped from a pile of pallet boards stacked on the dock to the railroad car and picked up a sling preparatory to hooking onto a load of piling when he fell over backwards from the railroad car to the dock, a distance of approximately 18 feet, in consequence of which he suffered injuries to his head, right shoulder and ribs; that Terminal No. 1, which is a dock approximately 1100 feet in length, is attached to the land at one end and juts outward to, and over the waters of the Willamette River for a distance of approximately 34 feet; that there are two sets of railroad tracks running alongside the dock and across the water side; that the gondola-type railroad car from which the piling was being unloaded was on the outside track approximately 8 feet 6 inches from the water side of the dock; that the injury sustained by the claimant had its inception on the railroad car and culminated on the dock; that the dock, due to its connection to the land, is an extension of the land; that the injury sustained by the claimant on May 1, 1965 did not occur upon the navigable waters of the United States (including any dry dock) and said injury is excluded under the provisions of Section 3(a) of the Act.

Upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim be, and it is hereby REJECTED for the reason that the injury sustained by the claimant on May 1, 1965 did

not occur upon the navigable waters of the United States (including any dry dock) within the meaning of the Longshoremen's and Harbor Workers' Compensation Act.

Given under my hand and filed at Seattle, Washington, this 15th day of July, 1965.

J. J. O'LEARY
Deputy Commissioner
Fourteenth Compensation District

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN HOUSER, *Libelant,*	)	
vs.	)	
J. J. O'LEARY, Deputy Commissioner, Fourteenth Compensation District, *Respondent,*	)	Civil No. 65-375
	)	OPINION
AMERICAN MAIL LINE, LTD., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Intervenors.*	)	March 19, 1966

SOLOMON, Chief Judge:

Libelant, John Houser, appeals from a decision of the Deputy Commissioner denying him compensation benefits under the Longshoreman's and Harbor Worker's Compensation Act. 33 U.S.C. §§ 901-950. This case is now before the Court on motions for summary judgment filed by all of the parties.

The facts are not in dispute. Houser was injured on May 1, 1965, while employed as a longshoreman by W. J. Jones, Inc., stevedores. He was working as a slingman on a pier adjacent to the vessel GUAM BEAR, which was afloat in navigable waters. Houser's job was to stand aboard a railroad car and hook a sling onto a load of creosoted piling which was then lifted from the railroad car to the deck of the

vessel by the vessel's gear. As Houser stepped aboard the railroad car and prepared to hook a sling onto a load of piling he fell over backwards from the car to the pier, a distance of approximately 18 feet. He suffered injuries to his head, right shoulder, and ribs.

The pier, Terminal No. 1 of the Portland Public Docks, runs approximately 1,100 feet alongside the Willamette River. It extends on pilings 34 feet over the water. Two railroad tracks run along the pier; the one on which Houser was injured was within ten feet of the water side of the pier.

Compensation under the Longshoreman's and Harbor Worker's Act is available only when the injury is suffered "upon the navigable waters of the United States (including any drydock)". 33 U.S.C. § 903(a). The Deputy Commissioner followed a long line of cases holding that a pier is an extension of the land and held that Houser's injury was not compensable under the Act because it did not occur upon the navigable waters of the United States. See, e.g., *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946); *Johnston* v. *Marshall*, 128 F.2d 13 (9 Cir. 1942); *American Export Lines, Inc.* v. *Revel*, 266 F.2d 82 (4 Cir. 1959).

Houser argues that the "navigable water" concept should be expanded to make coverage under the Act co-extensive with the limits of admiralty jurisdiction. The Admiralty Extension Act of 1948 extended maritime jurisdiction to injuries occurring on land but caused by a vessel on navigable water. 46 U.S.C. § 740. It thus made admiralty remedies available for at least some injuries suffered upon a pier. Houser then argues that State compensation plans cannot apply to injuries suffered within the admiralty ju-

risdiction [see *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917)] and that the Longshoreman's Act must be interpreted to fill the void.

Houser's argument has been uniformly rejected, most recently in an opinion by Walter E. Hoffman, an able and distinguished trial judge from the Eastern District of Virginia, Norfolk Division. *East* v. *Oosting*, 245 F. Supp. 51 (E.D. Va. 1965). See also *Johnson* v. *Traynor*, 243 F. Supp. 184 (D. Md. 1965). *Cf. Michigan Mutual Liability Co.* v. *Arrien*, 344 F.2d 640 (2 Cir. 1965). These cases also reject the contention that the water under a pier is navigable within the meaning of the Act.

I am convinced that the interpretation given to the Act by these cases is correct. The libelant's motion for summary judgment is denied. The motion for summary judgment of the respondent and intervenors is granted.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN HOUSER, *Appellant,*
vs.
J. J. O'LEARY, Deputy Commissioner Fourteenth Compensation District, AMERICAN MAIL LINE, LTD., a corporation, and FIREMAN'S FUND INSURANCE COMPANY, a corporation, *Appellees.*
No. 21,289

[September 27, 1967]

On Appeal from the United States District Court for the District of Oregon

Before: POPE, MERRILL and BROWNING, Circuit Judges

MERRILL, Circuit Judge:

The question presented by this appeal is whether the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, covers injuries occurring on wharves.

Appellant is a longshoreman who, on May 1, 1965, was engaged in loading the vessel Guam Bear at Portland. He was working as a slingman on a pier adjacent to the ship, which was afloat on navigable waters. His job was to stand on top of a railroad gondola car and hook a sling onto a load of cargo, which would then be lifted from the gondola to the deck of the ship by the ship's gear. As Houser stepped aboard

the gondola, he fell over backward from the car onto the pier, a distance of about 18 feet, and suffered severe injuries. The ship's gear played no part in the accident.

Section 903(a) provides:

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable water of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *"

Appellee Deputy Commissioner rejected appellant's claim for compensation upon the ground that the wharf where the injury occurred was, under a settled line of precedent, an extension of the land to which it was attached, and thus that the injury had not occurred on navigable waters. The District Court affirmed on the same ground. 253 F. Supp. 417 (D. Ore. 1966). We agree.

This court has, in the past, rejected coverage by the Act of injuries so located. *Johnston* v. *Marshall*, 128 F.2d 13 (9th Cir.) *cert. denied*, 317 U.S. 649 (1942).[1] Appellant contends, however, that the "nav-

[1] Even prior to the enactment of the Longshoremen's Act in 1927 injuries occurring on wharves were held to be land injuries and thus not on the "navigable waters" which then constituted all that was within the scope of general maritime law. *Industrial Commission* v. *Nordenholt Corp.*, 259 U.S. 263 (1922). Decisions since the Act have assumed that by its terms it excludes injuries suffered on piers, wharves and similar structures. *E.g.*, *Swanson* v. *Marra Bros.*, 328 U.S. 1 (1946); *O'Keefe* v. *Atlantic Stevedoring Co.*, 354 F.2d 48 (5th Cir. 1965); *American Export Lines* v. *Revel*, 266 F.2d 82 (4th Cir. 1959).

igable waters" concept should be expanded to make coverage under the Act coextensive with the limits of Admiralty jurisdiction. He points out that his employment under a maritime contract is within traditional Admiralty contract jurisdiction and that some wharf locus torts are covered by the current view of Admiralty tort jurisdiction. As support for his contention he relies on language in *Calbeck* v. *Travelers Insurance Company*, 370 U.S. 114, 130 (1962). There the Court, quoting Judge Hutcheson in *DeBardeleben Coal Corporation* v. *Henderson*, 142 F.2d 481, 483-84 (5th Cir. 1944), stated:

> "It is sufficient to say that Congress intended the Compensation Act to have a coverage coextensive with the limits of its authority * * *. In the application of the Act, therefore, the broadest ground it permits of should be taken."

To read this language as applying to the problem before us is to read it out of context. Neither *Calbeck* nor *DeBardeleben* was concerned with the meaning of the "navigable waters" requirement of § 903(a). The problem in those cases was how to construe the *second* requirement of § 903(a): whether the Act provided compensation for injuries sustained by employees on navigable waters "whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law." 370 U.S. at 117.

It may well be true that when it was judicially established that wharves were extensions of land the state of the law then excluded injuries occurring on land from Admiralty tort jurisdiction, and that the law has since changed and is still undergoing change in this respect. The fact is, however, that Congress